

APPENDIX L

Kentucky Attorney General Opinion

OAG 00-2

January 28, 2000

Subject: Whether the payment of teacher bonuses is a permissible use for school rewards under KRS 158.6455.

Requested by: Wilmer S. Cody, Commissioner, Kentucky Department of Education

Written by: Janet M. Graham, Assistant Attorney General

Syllabus: Under KRS 158.6455, it is permissible to use school reward money to pay teacher bonuses.

Constitutional provisions cited: §180, §184, §186

Statutes construed: KRS 158.6455

Opinion of the Attorney General

Synopsis

The Department of Education requests this Office to opine on whether it is permissible under KRS 158.6455 to use school reward money to pay teacher bonuses. Paying these teacher bonuses is a permissible use of the school reward money. The Kentucky Constitution permits these payments because teacher bonuses qualify as expenditures “for school purposes.” Additionally, although KRS 158.6455 was amended in 1998 to delete specific references to payments to staff, the present version of the statute does not expressly prohibit using the reward money for teacher bonuses. Instead, it merely provides that the local school council will determine how the reward money will be used. Finally, using the reward money to pay teacher bonuses accords with the legislative intent surrounding this statutory amendment¹.

¹ The opinion inquiry did not request an analysis of Section 3 of the Kentucky Constitution, nor did it request an exploration of the delegation doctrine. Therefore, these topics will not be addressed. This Opinion assumes that the teacher bonuses will be distributed to teachers “acting

In *Rose v. Council for Better Education*, Ky., 790 S.W.2d 186 (1989), the Kentucky Supreme Court determined that Kentucky's educational framework violated the Kentucky Constitution by failing to provide an efficient common school system. Following the *Rose* decision, the Kentucky General Assembly enacted the Kentucky Education Reform Act ("KERA"). Among its other provisions, KERA provides for the payment of rewards to those schools that meet certain performance criteria. KRS 158.6455.

In prior years, KRS 158.6455 expressly provided that the reward money could be paid to the staff. KRS 158.6455(1)(g) formerly read: "The certified staff members shall by majority rule collectively decide on the ways the reward funds shall be spent. Each individual staff person shall use the amount he earned in accordance with the decisions made by the total staff . . ." However, KRS 158.6455 was amended in 1998 to provide that the local school council has discretion to use the money for school purposes. The present statute provides "[A] reward shall be distributed to successful schools based on the number of full-time, part-time, and itinerant certified staff employed in the school on the last working day of the year of the reward to be used *for school purposes* as determined by the school council or, if none exists, the principal. . . ." (Emphasis added). The Department of Education requests an Opinion regarding whether it is permissible to use the reward money to pay teacher bonuses, i.e., whether payment of teacher bonuses is "for school purposes."

Kentucky Constitution §180, §184, §186

The Kentucky Constitution requires that school funds must be used for school purposes, and KRS 158.6455 incorporates this requirement in the language of the statute. Kentucky Constitution Sections 180², 184³, and 186⁴ prohibit the

under the control or supervision of the officers of the common schools." See *Halbert v. Sparks*, 72 Ky. 259 (9 Bush) (1872).

² Kentucky Constitution Section 180 states:

Every act enacted by the General Assembly, and every ordinance and resolution passed by any county, city, town or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, and

diversion of common school funds for purposes other than the maintenance of the Commonwealth's public schools. *Board of Educ. of Fayette County v. Lexington-Fayette Urban County Government*, Ky.App., 691 S.W.2d 218 (1985). Kentucky courts have generally been liberal in assessing expenditures purporting to be for school purposes. As noted in *Board of Educ. of Kenton County v. Talbott*, 286 Ky. 543, 151 S.W.2d 42, 45 (1941), "What are purposes of common school education is a matter of opinion; and, unless the particular item of expenditure is extreme or clearly otherwise, the legislature has the right to declare it to be such a purpose." See *Dodge v. Jefferson County Board of Education*, 298 Ky.1, 181 S.W.2d 406, 409 (1944) (noting that Section 184 is a broad provision which gives lawmakers discretion in supplying efficient common schools.)

no tax levied or collected for one purpose shall ever be devoted to another purpose.

³ Kentucky Constitution Section 184 states:

The bond of the Commonwealth issued in favor of the Board of Education for the sum of one million three hundred and twenty-seven thousand dollars shall constitute one bond of the Commonwealth in favor of the Board of Education, and this bond and the seventy-three thousand five hundred dollars of the stock in the Bank of Kentucky, held by the Board of Education, and its proceeds, shall be held inviolate for the purpose of sustaining the system of common schools. The interest and dividends of said fund, together with any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose. No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation: Provided, the tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law.

⁴ Kentucky Constitution Section 186 states:

All funds accruing to the school fund shall be used for the maintenance of the public schools of the Commonwealth, and for no other purpose, and the General Assembly shall by general law prescribe the manner of the distribution of the public school fund among the school districts and its use for public school purposes.

Although Kentucky courts have noted that “the term ‘school purposes’ is a broad and comprehensive one,” see *Ford v. Pike County Board of Education*, Ky., 310 Ky. 177, 220 S.W.2d 389 (1949), there is no singular test used in assessing

whether an expenditure of school funds is “for school purposes.” In fact, courts have employed several different tests in assessing these expenditures. One case uses the simple test of whether the contemplated expenditure is for the interest of the schools making the expenditure. *Schuerman v. State Board of Education*, 284 Ky. 556, 145 S.W.2d 42, 45 (1940). One case defines it more complexly as “whether the charges imposed bear such a relationship to the service provided as to enable the Court reasonably to say that the school funds have been expended for the exclusive benefit of the public schools.” *LFUCG*, 691 S.W.2d at 221 (1985). Finally, another case merely focuses on whether the expenditure promotes public education. *Hogan v. Glasscock*, Ky., 324 S.W.2d 815, 817 (1959).

At any rate, under any of the tests outlined above, paying teacher bonuses involves using the reward money “for school purposes⁵.” Rewarding teachers promotes public education by encouraging them to continue to improve Kentucky’s common school system. Permitting teachers to share in the success of school advancement serves as an incentive for qualified and experienced teachers to stay in the public school system rather than moving to more lucrative employment in the private sector.

Although no Kentucky case has specifically addressed the issue of teacher bonuses, Kentucky case law supports the proposition that teacher bonuses are expenditures “for school purposes.” In other cases involving payments to teachers and staff, Kentucky courts have been liberal in finding that these expenditures are for school purposes. See *Board of Educ. of Bowling Green v. Simmons*, 245 Ky. 493, 53 S.W.2d 940 (1932) (funding of a school nurse position is for a school purpose). Kentucky courts have also validated the appropriation of funds for retired teachers. *Board of Educ. of Louisville v. City of Louisville*, 288 Ky. 656, 157 S.W.2d 337, 346 (1941) (“There are many services paid for out of school funds farther outside the purpose than paying pensions to retired teachers, the basis of which. . . is . . . to reward faithful service. . .”) Finally, even payments *on behalf of*

⁵ This phrase has been used for many years in Kentucky. The first mention of this phrase in Kentucky case law appears to have been in 1802. See *Craig v. Trustees of Transylvania*, 2 Ky. (Sneed) 155 (1802).

staff have been approved. For example, professional membership dues can permissibly be paid from school funds and are considered to be for educational purposes. See *Schuerman v. State Board of Education*, 284 Ky. 556, 145 S.W.2d 42, 45 (1940) (holding membership dues in the Kentucky School Boards Association are expenditures for school purposes). Finally, litigation expenses, including attorney fees for defending school personnel, constitute expenditures “for school purposes.” *Hogan v. Glasscock*, Ky., 324 S.W.2d 815 (1959).

Not only have Kentucky courts sanctioned the above expenditures, but they also have validated expenditures that stray from the traditional view of school expenses. For instance, the payment of a gas tax is a school purpose, *Board of Educ. of Kenton County v. Talbott*, 286 Ky. 543, 151 S.W.2d 42, 46 (1941), as is the payment of sewer user fees. *Board of Education of Fayette County v. Lexington-Fayette Urban County Government*, Ky. App., 691 S.W.2d 218 (1985). The cases where courts refuse to sanction expenditures are cases involving expenditures that benefit the general public at large versus those that solely benefit the school itself or its staff. For example, school funds may not be used to maintain a public library, *Board of Educ. of City of Covington v. Board of Trustees of Public Library of City of Covington*, 113 Ky. 234, 68 S.W.10 (1902). Additionally, school funds cannot be used to build a floodwall for a city. See *Board of Educ. of Spencer County v. Spencer County, Levee, Flood Control and Drainage District No. 1*, 313 Ky. 8, 230 S.W.2d 81 (1950).

The reason that it is important to review prior judicial constructions of the phrase “for school purposes” is because the legislature is deemed to have known of these constructions when it inserted this language into the amended version of KRS 158.6455. See *Baker v. White*, 251 Ky. 691, 65 S.W.2d 1022 (1933) (holding that the legislature is presumed to know about existing law and the constructions of existing law that the courts have placed on them.) By using the liberally construed phrase “for school purposes”, the legislature evinced its intent to grant leeway to the local school councils in distributing the school rewards, including the ability to permit the councils to distribute the rewards as teacher bonuses if they so desire.

Statutory Construction/The Presumption of Change

Notwithstanding the liberal constructions of the phrase “for school purposes,” one could argue that by amending⁶ the statute to delete the references to payments to staff, the legislature intended to end this practice. This argument embodies the theory known as the “presumption of change.” The presumption of change is a special statutory construction technique that is used to interpret statutory amendments. As noted in Sutherland, *Statutory Construction* § 22.30 (5th Ed. 1993), “Courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one.”

Kentucky courts also recognize the “presumption of change,” holding that it is presumed that an amendment is intended to change the law. See *Whitley County Board of Educ. v. Meadors*, Ky., 444 S.W.2d 890 (1969); *Brown v. Sammons*, Ky., 743 S.W.2d 23, 24 (1988) (“It is beyond dispute that whenever a statute is amended, courts must presume that the Legislature intended to effect a change in the law.”) Additionally, where a clause in an enactment is omitted from a new enactment, it is inferred that the Legislature intended that the omitted clause should no longer be the law. *Inland Steel Co. v. Hall*, Ky., 245 S.W.2d 437 (1952).

However, in determining the scope of an amendment, courts must look to the specific wording of the amendment and not interpret the change in the law in a broader fashion than what is specifically expressed. When a statute is amended, “it is also presumed that the legislature did not intend to effect a greater change than is clearly apparent either by express declaration or by necessary implication.” Sutherland, *Statutory Construction* § 22.02 (5th Ed. 1993). See *Logsdon v. Howard*, 280 Ky. 342, 133 S.W.2d 60, 62 (1939) (“We have no right to conclude that the 1938 legislature in amending the involved section intended to accomplish any more than what it said . . .”) See also *Heflin v. State Farm Mutual Auto Ins. Co.*, 547 F.Supp 247 (N.D. Ga. 1982).

⁶ According to Sutherland, *Statutory Construction* § 22.01, an act is amendatory if it changes “the scope or effect of an existing statute, by addition, omission, or substitution of provisions . . .” *Id.* at 172. The statute in this case is amended because it deletes the prior method of distributing the rewards and provides for a new method. Additionally, the Act itself states that it is amending KRS 158.6455.

In this case, the amendment does change the law, but it does not specifically prohibit using the reward money to pay teacher bonuses. The amendment merely provides that the local school council will have discretion regarding how the rewards will be distributed. There is no cause for reading into the amendment a prohibition that is not expressly stated.

Legislative History of KRS 158.6455 Amendment

Statutory construction begins and ends with one purpose: discovering legislative intent. *Kentucky Indus. Utility Customers Inc. v. Kentucky Utilities Co.*, Ky., 983 S.W.2d 493 (1998). In order to ascertain the legislative intent, courts may look to the reports of legislative committees and the words spoken in debate. *Fiscal Court of Jefferson County v. City of Louisville, Ky.*, 559 S.W.2d 478 (1977). In this case, the legislative debate clearly indicates the intent of the legislature was not to foreclose the use of reward money to pay teacher bonuses.

The debate on House Bill 53 was held on the House floor on April 1, 1998. Representative Harry Moberly, the Chair of the House Appropriations and Revenue Committee, explained the substantive provisions of the bill and took questions from other legislators during an extensive debate on House Bill 53. The subject of the uses of the reward money was specifically addressed. Representative Hoby Anderson inquired of Representative Moberly regarding how the reward money would be distributed:

Representative Anderson: On page 18, when it, when it talks about the year 2000 and the award money, and basically, I think it says that the school council, which I take to mean the site-based council, is that correct?

Representative Moberly: That is correct.

Representative Anderson: Uh, that they can determine what to do with that money for school use – If that site based council determined that giving cash bonuses to teachers was for school use, would they be allowed to do this under this bill?

Representative Moberly: The language says it would be “for school purposes”, and it would have to be determined that that was a school purpose . . . I would think “school purpose” would be for

school – maybe for school expenses, uh, for a classroom, um supplies, or whatever they thought would promote the instruction of the kids – yeah I’d say it could be professional development. It would be up to the council to determine as to whether or not it could be paid out as a teacher bonus. I think that would have to be done by regulation, but I would say that would be a possibility if the regulations allowed it.

Representative Anderson: Uh, but, but, teachers’ pay would be determined “school purposes” wouldn’t you not say?

Representative Moberly: Uh, actually, gentleman from Greenup, I don’t know whether a teacher – it wouldn’t be their salary, - it might be a bonus – you might be able to interpret that as saying that if the council wanted to use the money for a teacher bonus that they could pay it. I would, you know, off the top of my head, I would say that could be possible, yes.

Additionally, Representative Moberly echoed these sentiments on July 1, 1999, during a meeting of the Education Assessment and Accountability Review Subcommittee regarding the proposed administrative regulations to be adopted. Although this was after the amendment to KRS 158.6455 was adopted, the comments are relevant because they relate to the floor debate held on April 1, 1998. In response to a comment from Mrs. Helen Mountjoy, Representative Moberly again stated that nothing prohibited school councils from distributing the reward money as teacher bonuses, stating:

I wanted to mention where there might be some disconnect between me and your understanding in the distribution of rewards. Uh, I know when we put the piece in the bill, at least in my initial bill, I wanted to keep distributing them to teachers. Uh, under the overwhelming weight of the sentiment – Senate sentiment - on that – uh, you know we said [they were] to be distributed by the school council. Uh, but in our debate, and in the language of the bill, we never understood that it prohibited any distribution to staff, and it doesn’t say that. It says, the statute says for school purposes – you just said not be distributed to staff. The regulation is still not specific one way or the other, but to me, it would allow for distribution, some distribution to any staff as determined by the council . . .

So, to me the clear legislative intent was to leave that decision - not - to the council, not to say you're precluded from distributing any money to the staff. And that was the debate in the House, and I answered a question that way on the Floor, so I wanted to make you aware of that . . .

These comments clearly indicate a legislative intent not to prohibit the use of the school reward money to pay teacher bonuses.

Conclusion

KRS 158.6455 permits a local school council or principal to use school reward money to pay teacher bonuses. These bonuses are permissible under the Kentucky Constitution because they are "for school purposes." Additionally, although KRS 158.6455 has been amended to delete certain provisions, the present statute does not prohibit using the reward money to pay teacher bonuses. Finally, there is no evidence of a legislative intent to prohibit this use of the reward money.

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